Supreme Court, U.S.
FILED
SEP 8 1999
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(3)

No. 99-180

IN THE
Supreme Court of the United States

CAROL M. KONKEL,

Petitioner,

v.

BOB EVANS FARMS, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner, Carol M. Konkel ("Konkel"), respectfully submits this Reply Brief in support of her Petition for Writ of Certiorari, and in response to the Brief in Opposition filed by Bob Evans Farms, Inc. ("Bob Evans").

A. Compensatory Damages Award.

First, nothing in Bob Evans' brief truly addresses the fundamental issue before this Court, namely, whether the Seventh Amendment permits a Court of Appeals to conduct a *de novo* review of the trial court record, to impose its own view of an appropriate compensatory damages award, and to reduce the jury's award by more than 97%. That is precisely what the Fourth Circuit did in this case, in violation of the Seventh Amendment and in disregard of the admonitions of this Court that appellate review for verdict excessiveness is extremely limited. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Rather than determining whether the trial court judge abused his discretion in refusing to set aside the jury's $1 million verdict, the Fourth Circuit instead embarked on a purported survey of Pennsylvania case law, and then simply decided, in *de novo* fashion, that in its view the appropriate award should be $25,000, an unprecedented reduction of more than 97%. That is precisely the type of appellate interference prohibited by the Seventh Amendment in *Gasperini*. The Seventh Amendment guarantees the right to a trial by jury, not by appellate court judges who do not hear a single word of testimony.

Second, the Seventh Amendment violation is *not* remedied by the option of a new trial. If it were, then this Court would not have taken such pains to emphasize the limited scope of appellate review of jury verdicts in *Gasperini*. Instead, the Court could have held that so long as the option of a new trial is granted, there are no constraints on the appellate court. That is precisely what this Court *did not* do in *Gasperini*. The option of a new trial does not remedy the constitutional violation.

Third, in its incomplete survey of Pennsylvania Law, the Fourth Circuit ignored all five controlling Pennsylvania Supreme

Court cases cited by Konkel, and instead focused on two intermediate court of appeals opinions. The dispositive case, *Botek v. Mine Safety Appliance Corp.*, 531 Pa. 160, 611 A.2d 1174 (1992), was neither cited nor distinguished by the Fourth Circuit. Bob Evans says nothing about the Fourth Circuit's failure to address *Botek* and the other cases cited by Konkel. Instead, Bob Evans suggests that *Botek* simply requires the option of a new trial if a remittitur is granted. That is a complete misreading of *Botek*. The Pennsylvania Supreme Court in *Botek* reinstated the jury's verdict and did not remand the case for a new trial nor did the Pennsylvania Supreme Court in *Botek* criticize the intermediate appellate court simply for not remanding the case for a new trial. Instead, the Pennsylvania Supreme Court in *Botek* sharply criticized the intermediate court of appeals for substituting its view of an appropriate compensatory damages award for that of the jury, and held, in absolutely clear terms, that a jury's verdict is to be affirmed by the trial court judge unless it is so outrageous as to shock the trial court judge's conscience. That is precisely the test the trial court judge applied in this case.

Fourth, Bob Evans ignores the Pennsylvania Supreme Court cases cited by Konkel which make clear that the factors focused on by the Fourth Circuit (including, strangely enough, the *amount sued for*) do not constitute some sort of checklist against which a verdict is to be tested. Instead, the Pennsylvania Supreme Court has made clear that the trial court judge must give reasons for his decision not to overturn the jury verdict for excessiveness, which is precisely what the trial court judge did here.

Finally, Bob Evans suggests that granting the petition would be a waste of judicial resources. The real waste of judicial resources, however, would be if another jury has to listen to Bob Evans "soapy water" mantra yet again. Carol Konkel swallowed a high-alkali caustic cleaner that Bob Evans was using to destain its coffee pots. She suffered esophageal chemical burns and her lifestyle was destroyed in the process.

Bob Evans suggests now, just as it suggested at trial, that Konkel was not "really" injured, but the testimony of the parties' physicians, the testimony of Konkel and the witnesses that observed the devastating effect of her condition on her life, and the jury's $1 million verdict make clear that Bob Evans version of the facts was rejected by the jury. The trial of this case represented what the trial court judge properly recognized were two competing views of the facts. That is precisely why the Seventh Amendment provides for a trial by jury. Bob Evans has offered no legitimate reason why judicial resources should be wasted for yet another trial.

B. The Punitive Damages Claim.

Bob Evans asserts, without citing a single supporting case, that Fed. R. Civ. P. 54 does not mean what is says, and that a party must move to amend her pleadings in order to obtain all of the relief to which she is entitled. Bob Evans neither cites nor distinguishes any of the cases cited by Konkel which make clear that Fed. R. Civ. P. 54 provides that a party's relief is not limited to the relief sought in the pleadings.

Instead, Bob Evans cites *Smith v. Brown*, 283 Pa. Super. 116, 423 A.2d 743 (1980), yet another intermediate appellate court case. *Smith* has no application here. It was a Pennsylvania state court case involving Pennsylvania state court procedure at a time when Pennsylvania was a *fact pleading* State, not a *notice pleading* State. *Smith* is completely irrelevant.

Bob Evans also simply asserts, without citing any case law, that it was appropriate for the Fourth Circuit to refuse to even consider Konkel's appeal with respect to punitive damages because the "facts" would not support a claim for punitive damages. Of course, given that the punitive damage claim was dismissed prior to trial, not all the facts supporting that claim were even presented at trial. Those "facts" include the fact that Bob Evans was specifically instructed to keep the caustic cleaner out of the food preparation area, and that the Bob Evans manager in charge of the very restaurant in which Konkel was injured

was specifically told to keep the caustic cleaner out of the food preparation area by the cleaner's manufacturer representative. Despite these specific instructions, Bob Evans took the caustic cleaner, which it knew was colorless and virtually odorless, placed it in the empty coffee filter baskets in the food preparation area, and then brewed the caustic cleaner next to the other pots being used to serve patrons coffee and hot water for tea. Those facts alone are sufficient to raise a jury question as to whether Bob Evans conduct was not merely negligent, but reckless. Under Pennsylvania law, reckless conduct alone is sufficient to give rise to a claim for punitive damages. It was error for the Fourth Circuit to refuse to even consider Konkel's appeal with respect to this issue and Bob Evans has offered no legitimate response to that claim.

Indeed, Bob Evans' sole opposition to Konkel's motion for summary judgment with respect to punitive damages was Bob Evans' claim that such damages had to be demanded in the pleadings. If this Court determines that Rule 54 does not require punitive damages to be requested in the pleadings, then Konkel's motion for summary judgment on punitive damages is unopposed, and the punitive damages claim should be remanded to the trial court judge, with instructions that punitive damages should be awarded in an amount to be determined by a jury. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986).

CONCLUSION

For the foregoing reasons, as well as those stated in Konkel's petition, the petition should be granted and the jury's compensatory damages award should be reinstated. In addition, the case should be remanded to the trial court with instructions that punitive damages should be awarded in an amount to be determined by a jury.

Respectfully submitted,

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